

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.³

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On October 27, 2015 the employee, then a 46-year-old paint supervisor, filed an occupational disease claim (Form CA-2) alleging that he sustained an emotional condition, including severe depression, due to working in a hangar and becoming overwhelmed at work. He claimed that he started having "some issues at work" in 2014 and was becoming stressed and letting things get to him. The employee noted that he tried to commit suicide on July 9, 2014 and asserted that he first became aware of his claimed condition and its relationship to his federal employment on the same date.⁴

The employee submitted administrative documents, including a notification of personnel action (Standard Form 50) dated July 8, 2013 and standard core personnel documents from October 2000 describing the painter supervisor position. In October 5 and 12, 2015 notes, Dr. Dwight L. Bearden, an attending Board-certified psychiatrist, advised that the employee needed reasonable accommodation in a nonsupervisory position in order to return to work.

In a November 12, 2015 development letter, OWCP requested that the employee submit additional evidence in support of his claim, including a physician's opinion supported by a medical explanation regarding the cause of his claimed emotional condition. It requested that the employee complete and return an attached questionnaire which posed various questions regarding the employment-related factors and conditions which he believed caused or aggravated his claimed condition. OWCP afforded the employee 30 days to respond.⁵

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

⁴ The employee asserted that he was hospitalized for 30 days commencing July 9, 2014 and for 21 days commencing August 22, 2015 due to the stress that he began to experience in 2014. He indicated that he went back to supervisory work in the hangar for several months between these two hospitalizations. On the reverse side of the Form CA-2, the employee's immediate supervisor indicated that the employee last stopped work on September 22, 2015 and he asserted that the claim needed to be challenged "on causal relationship and fact of injury."

⁵ On November 12, 2015 OWCP requested additional information from the employing establishment and afforded it 30 days to respond.

The employee submitted an e-mail exchange dated August 12 and 13, 2013 in which he discussed his work duties and workload with a supervisor, an October 12, 2015 plan for care after being discharged from the hospital, and an undated Occupational Safety and Health Administration incident report in which he related a July 9, 2014 work incident to “work stress.”

In a December 17, 2015 report, Dr. Bearden indicated that the employee experienced significant stress related to his management of personnel in multiple shops and he opined that this stress led to anxiety, depression, and suicidal ideation. He requested that the employing establishment provide the employee with reasonable accommodation by relieving him of duties requiring supervision of personnel in multiple shops.

In a February 5, 2016 letter, an employing establishment official challenged the employee’s claim by asserting that he failed to identify specific events at work which adversely affected him and that he failed to submit sufficient medical documentation.

By decision dated March 3, 2016, OWCP denied the employee’s claim for an employment-related emotional condition because he failed to establish fact of injury. It found that he failed to establish a compensable employment factor because he did not provide specific details describing the time, date, place, and nature of the implicated work events or conditions. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On December 21, 2016 OWCP received a number of documents from the employee, but he did not request reconsideration of the March 3, 2016 decision at that time. An unsigned and undated document entitled, “Chemicals I have used for the last 17 years,” lists 18 chemicals, including methylene chloride and hydrogen peroxide, and contains the statement, “All chemicals on this list are known to cause [central nervous system] depression and [neurological] damage to the brain, and birth defects.” Copies of photographs and floorplans of an unidentified worksite contain handwritten notations regarding perceived deficiencies in the ventilation system. The floorplans identified the worksite as a “controlled area” for methylene chloride and hexavalent chromium.

In an undated memorandum, the chief of the program and construction management section for the employing establishment indicated that Building 54 had to cease being used as a paint hangar if it did not come into compliance by September 2008. The chief asserted that the electrical and ventilation systems of Building 54 were not designed to meet the fire, safety, and bio-environmental requirements of a paint hanger. He noted that worker exposures for chromium in Building 54 had consistently ranged from 300 to 500 times over the Occupational Safety and Health Administration (OSHA) exposure limit. An unidentified person added the following handwritten comment to the document: “I worked in Bldg. 54 from 1997 till [December 2009].”⁶ An unsigned and undated document lists reports, dated between September 16, 2014 and August 1, 2016, pertaining to medical examinations and diagnostic.⁷

⁶ In a June 26, 2007 e-mail, an employing establishment official advised a coworker that a 2006 study revealed that Building 54 had numerous deficiencies as a paint hanger.

⁷ The document also lists the above-described factual materials received by OWCP on December 21, 2016.

The employee submitted a number of medical documents which also were received by OWCP on December 21, 2016. In a July 18, 2014 hospital discharge summary report, Dr. Asad Naqvi, a Board-certified psychiatrist, indicated that the employee was admitted on July 10, 2014 at which time he reported that he had tried to commit suicide on two separate occasions approximately a week prior. He diagnosed major depressive disorder and alcohol abuse and indicated that the employee would pursue follow-up care with a therapist and another Board-certified psychiatrist, Dr. Babatunde Fagbamiye. In periodic progress reports dated between September 16, 2014 and August 6, 2015, Dr. Fagbamiye noted that the employee primarily reported stress due to financial difficulties and problems in his relationship with his wife. He noted that the employee denied suicidal thoughts (apart from one instance) and diagnosed bipolar 1 disorder (most recent episode depressive, mild).

In a March 16, 2016 report, Dr. Prem S. Parihar, a Board-certified neurologist, indicated that the employee presented complaining of a history of depression for 13 years. The employee reported that he had been exposed to chemicals at work (including phenol sodium chromate, chloride, chromium, ketones, and acetones) and he referenced medical literature which indicated that some of these chemicals negatively affected cognitive function. Dr. Parihar diagnosed right carpal tunnel syndrome, depression, mild cognitive impairment, and amnesia, and noted that exposure to phenol sodium chromate and chromium can cause peripheral neuropathy. He indicated that the employee had been exposed to various aromatic compounds and had developed suicidal thoughts.

The findings of a March 21, 2016 magnetic resonance imaging (MRI) scan of the employee's head contained an impression of mild changes of chronic microvascular ischemia with no acute infarct, hemorrhage, or mass effect.

In April 4 and May 24, 2016 reports, Dr. Parihar expressed his concern that the employee's exposure to toxins could have contributed to his neuropsychological dysfunction. He noted that this matter required detailed evaluation because the employee exhibited white matter changes on an April 25, 2016 single-photon emission computerized tomography (SPECT) scan which could either be nonspecific or related to toxins.⁸

In a June 15, 2016 report, Dr. Adam Pomerleau, an attending Board-certified emergency medicine physician, advised that the employee presented complaining of anxiety, suicidal thoughts, depression, emotional lability, talkativeness, and memory/concentration problems. The employee reported that he was exposed to numerous chemicals while working as a painter/depainter and supervisor of painting/depainting for 17 years, but especially the paint-removing agents methylene chloride and hydrogen peroxide.⁹ Dr. Pomerleau reported the findings of his physical examination, noting essentially normal results in the pulmonary, neurological, and psychiatric portions of the examination. He diagnosed history of exposure to methylene chloride

⁸ The employee submitted a copy of the April 25, 2016 SPECT scan which noted that the findings were consistent with a traumatic brain injury and toxic/hypoxic encephalopathic process.

⁹ The employee reported to Dr. Pomerleau that he wore a particulate mask and gloves most of the time he worked. Dr. Pomerleau advised that he had reviewed reports which identified higher than allowed levels of methylene chloride and hexavalent chromium in the employee's worksite from 2014 and 2015, but he noted that the reports did not include quantitative data. The case does not contain the reports referenced by Dr. Pomerleau.

and other solvents, suspected chronic toxic encephalopathy, and unilateral peripheral neuropathy (unlikely related to occupational exposure).

Dr. Pomerleau indicated that the employee had a “compelling case for the possibility of chronic toxic encephalopathy related to heavy solvent exposure over many years.” He maintained that the employee fit the World Health Organization type II and the Raleigh type 2a profiles for chronic toxic encephalopathy, but noted that it was necessary to carry out objective memory and attention testing in the form of neuropsychiatric battery testing to consider whether he fit the Raleigh type 2b profile. Dr. Pomerleau advised that the employee had no other compelling causes for his symptoms, such as a traumatic injury or family history, and noted that an organic etiology was not required to diagnose the mental illnesses that had previously been diagnosed by other physicians. He indicated that, although the April 25, 2016 SPECT scan showed areas of hypoperfusion (particularly in the basal ganglia/thalamus) as would be expected after exposure to methylene chloride, this type of test was still mainly an experimental diagnostic tool and could not be used definitively for the diagnosis of brain injury from a toxic etiology such as solvent exposure.¹⁰

In a July 26, 2018 report, Dr. Parihar advised that the employee reported that in 2014 and 2015 the employing establishment allowed him to be exposed to higher than allowed levels of various chemicals, including chloride and chromium. He diagnosed toxic encephalopathy and depression, and noted, “This is due to heavy solvent exposure over many years manifesting in the form of neurobehavioral deficits or chronic toxic encephalopathy. The exact mechanism is not known.” In an August 1, 2016 report, Dr. Parihar indicated, that after reviewing the medical records, he believed that the employee’s chronic toxic encephalopathy was related to his 17-year exposure to low doses of solvents, paint, and paint removers. He maintained that the employee fit the World Health Organization type II and the Raleigh type 2a profiles for chronic toxic encephalopathy.

The employee also submitted medical reports pertaining to his back and lower extremity symptoms in 2011 and 2012, including back pain and bilateral foot numbness, and his bronchitis and hyperlipidemia in 2015 and 2016.

In August 2017 appellant submitted documents showing that the employee died on May 5, 2017. She submitted a marriage license memorializing her marriage to the employee and a death certificate filed on May 9, 2017 which listed the immediate cause of death as “gunshot

¹⁰ In his June 15, 2016 report, Dr. Pomerleau also generally discussed medical literature regarding methylene chloride toxicity and chronic toxic encephalopathy. He further opined that the employee’s right peripheral neuropathy, mainly affecting his right hand, was unlikely related to his exposure to solvents because peripheral neuropathy from solvent exposure tended to occur bilaterally in a stocking-glove distribution.

wound of the head.” The death certificate indicated that appellant was married to the employee at the time of his death.¹¹

Appellant requested reconsideration of OWCP’s March 3, 2016 decision on behalf of the employee by submitting a copy of a November 21, 2016 document which was received by OWCP on March 20, 2018. The document, containing unsigned signature blocks for counsel and the employee, indicated that the employee was requesting reconsideration of OWCP’s March 3, 2016 decision.¹² It contained the argument that the employee sustained environmental and emotional medical conditions related to his exposure to chemicals when he worked in Building 54 from 1999 to 2009 and in Building 180 from 2009 to 2016. It was alleged that the ventilation system for Building 54 was not in compliance with the relevant standards for a paint hanger and that chromium levels consistently ranged from 300 to over 500 times the OSHA exposure limit while appellant worked there. Moreover, the ventilation system for Building 180 was not in compliance and the workplace exceeded the OSHA exposure limits for lead, chromium, cadmium, and methylene chloride.

In support of the reconsideration request, appellant submitted an undated and unsigned memorandum concerning the use of Building 54 as a paint hanger. The document indicated that a 2006 study showed that the ventilation system of Building 54 failed to reduce actual exposures to levels below permissible exposure level limits. In a May 23, 2012 report, two chemists for the employing establishment reported that a dust sample obtained from the roof of Building 180 on May 12, 2012 revealed the presence of silicates, paint pigments, and a wide assortment of metals, including chromium and strontium chromate. In an undated form document, entitled “work exposure hearing,” the employee identified chemicals to which he was exposed while working in unspecified workspaces since 1998. The chemicals included methylene chloride, lead, chromates, toluene, and ketones.

Appellant also submitted documents which had previously been submitted by the employee in December 2016, including the undated memorandum of the chief of the program and construction management section, Dr. Naqvi’s July 18, 2014 report, Dr. Fagbamiye’s progress notes produced between September 16, 2014 and August 6, 2015, the April 25, 2016 SPECT scan, Dr. Parihar’s reports produced between March 16 and August 1, 2016, and Dr. Pomerleau’s June 15, 2016 report.

By decision dated April 6, 2018, OWCP denied appellant’s request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error in its March 3, 2016 decision. It noted that she submitted documentation in support of her untimely reconsideration

¹¹ An August 27, 2017 report of the employing establishment’s Office of Special Investigations indicated that the employee died on the work premises on May 17, 2017 of an apparent self-inflicted gunshot to the head. The report includes an attached unsigned May 9, 2016 journal-type document in which the author generally discussed having too many responsibilities at work. The case record contains a claim for survivor’s benefits (Form CA-5) that appellant filed on March 20, 2018. However, the case record does not contain a final decision regarding appellant’s claim for survivor’s benefits and the matter is not currently before the Board. *See* 20 C.F.R. § 501.2(c).

¹² The second page of this four-page document, listing various factual and medical documents in the case record, had previously been submitted to OWCP in December 2016. This page does not contain any language referring to a reconsideration request.

request, but found that this evidence failed to demonstrate clear evidence of error in the prior decision.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.¹³ This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.¹⁴ Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the integrated Federal Employees' Compensation System (iFECS).¹⁵ Imposition of this one-year filing limitation does not constitute an abuse of discretion.¹⁶

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error.¹⁷ If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.¹⁸

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP. The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error. Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error. It is not enough to merely demonstrate that the evidence could be construed so as to produce a contrary conclusion. This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP. To demonstrate clear evidence of error, the evidence submitted must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹⁹

¹³ 5 U.S.C. § 8128(a); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

¹⁴ 20 C.F.R. § 10.607(a).

¹⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

¹⁶ *G.G.*, Docket No. 18-1072 (issued January 7, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹⁷ *See* 20 C.F.R. § 10.607(b); *M.H.*, Docket No. 18-0623 (issued October 4, 2018); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹⁸ *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010). *See also* 20 C.F.R. § 10.607(b); *supra* note 15 at Chapter 2.1602.5 (February 2016).

¹⁹ *S.W.*, Docket No. 18-0126 (issued May 14, 2019); *Robert G. Burns*, 57 ECAB 657 (2006).

OWCP procedures note that the term clear evidence of error is intended to represent a difficult standard. The claimant must present evidence which on its face demonstrate that OWCP made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.²⁰ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.²¹

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

The Board finds that OWCP properly determined that appellant failed to file a timely request for reconsideration. An application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.²² As appellant's request for reconsideration was not received by OWCP until March 20, 2018, more than one year after issuance of its March 3, 2016 merit decision, it was untimely filed.²³ Consequently, she must demonstrate clear evidence of error by OWCP in its March 3, 2016 decision.

The Board further finds that appellant has not demonstrated clear evidence of error on the part of OWCP in issuing its March 3, 2016 decision.

Appellant failed to submit the type of positive, precise, and explicit evidence which manifests on its face that OWCP committed an error in its March 3, 2016 decision.²⁴ The evidence and argument she submitted did not raise a substantial question concerning the correctness of OWCP's prior decision.²⁵

OWCP denied the employee's claim on a factual basis, *i.e.*, the failure to establish a compensable employment factor. Upon reconsideration, appellant presented the argument that the employee sustained environmental and emotional medical conditions related to his exposure to chemicals while working in Building 54 and Building 180 between 1999 and 2016. The Board notes, however, that appellant did not explain how this argument raised a substantial question as to the correctness of OWCP's March 3, 2016 decision. Appellant submitted a number of factual

²⁰ *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 15 at Chapter 2.1602.5(a) (February 2016).

²¹ *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

²² *See supra* note 14.

²³ On appeal counsel argues that a timely request for reconsideration of OWCP's March 3, 2016 decision was filed in November 2016. However, as noted, the case record shows that a request for reconsideration of the March 3, 2016 decision was not filed until March 30, 2018, *i.e.*, the date that appellant filed a request for reconsideration on behalf of the deceased employee.

²⁴ *See supra* note 19.

²⁵ *Id.*

documents in support of this argument, but these documents do not, on their face, demonstrate clear evidence of error in the March 3, 2016 decision. For example, in an undated memorandum, the chief of the program and construction management section for the employing establishment indicated that Building 54 had to cease being used as a paint hangar if it did not come into compliance with relevant standards by September 2008. The chief noted that worker exposures for chromium in Building 54 had consistently ranged from 300 to 500 times over the OSHA exposure limit. In a May 23, 2012 report, two chemists for the employing establishment reported that a dust sample obtained from the roof of Building 180 on May 12, 2012 revealed the presence of silicates, paint pigments, and an assortment of metals, including chromium and strontium chromate.

The Board, however, has reviewed these factual documents and finds that collectively they do not, on their face, establish an employment factor or otherwise demonstrate clear evidence of error in OWCP's March 3, 2016 decision. The documents are vague in nature with respect to their discussion of chemicals in the workplace and it remains unclear from the record whether or to what extent the employee was exposed to various chemicals in the workplace. For example, appellant did not submit evidence detailing the specific nature and extent of the employee's work in Building 54, nor does the case record contain an environmental study describing sample data showing the precise levels of chromium and other substances in the specific workspaces where the employee worked in Building 54. Although the May 23, 2012 report submitted by appellant revealed the presence of silicates, paint pigments, and metals such as chromium and strontium chromate in Building 180, the case record lacks evidence showing the specific nature and extent of the employee's work history and chemical exposure in Building 180.

After OWCP's March 3, 2016 decision, various medical reports were added to the medical record. The Board finds, however, that the submission of these reports do not demonstrate clear evidence of error in OWCP's March 3, 2016 decision. In March 16, April 4, and May 24, 2016 reports, Dr. Parihar expressed his concern that the employee's exposure to toxins could have contributed to his neuropsychological dysfunction. On July 26 and August 1, 2016 he opined, without elaboration, that the employee sustained chronic toxic encephalopathy due to exposure to chemicals in the workplace. In addition, Dr. Pomerleau noted in a June 15, 2016 report that the employee had a "compelling case for the possibility of chronic toxic encephalopathy related to heavy solvent exposure over many years."²⁶

The Board notes that even if employment factors were established and an evaluation of the medical evidence was undertaken, these medical reports do not demonstrate clear evidence of error in the March 3, 2016 decision because they contain opinions on causal relationship which are

²⁶ Dr. Pomerleau indicated that, although an April 25, 2016 SPECT scan showed areas of hypoperfusion as would be expected after exposure to methylene chloride, this type of test was still mainly an experimental diagnostic tool and could not be used definitively for the diagnosis of brain injury from a toxic etiology such as solvent exposure.

speculative in nature²⁷ or lack adequate supporting medical rationale.²⁸ As noted, clear evidence of error is intended to represent a difficult standard.²⁹ Even a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical evidence requiring further development is insufficient to demonstrate clear evidence of error. It is not enough to show that evidence could be construed so as to produce a contrary conclusion. Instead, the evidence must shift the weight in appellant's favor.³⁰

The Board finds that appellant's request for reconsideration does not show on its face that OWCP committed error when it found in its March 3, 2016 decision that the employee had not sustained an employment-related medical condition.³¹ Therefore, OWCP properly determined that appellant did not demonstrate clear evidence of error in its March 3, 2016 decision.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

²⁷ See *E.B.*, Docket No. 18-1060 (issued November 1, 2018); *Leonard J. O'Keefe*, 14 ECAB 42, 48 (1962) (finding that an opinion which is speculative in nature is of limited probative value regarding the issue of causal relationship).

²⁸ See *D.R.*, Docket No. 16-0528 (issued August 24, 2016) (finding that a report is of limited probative value regarding causal relationship if it does not contain medical rationale explaining the relationship between a given employment condition/activity and a diagnosed medical condition).

²⁹ See *supra* note 20.

³⁰ *M.E.*, Docket No. 18-1442 (issued April 22, 2019).

³¹ See *S.F.*, Docket No. 09-0270 (issued August 26, 2009).

ORDER

IT IS HEREBY ORDERED THAT the April 6, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 3, 2019
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board